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In the Supreme Court of the United States

OCTOBER TERM, 1974

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR,
PETITIONER

v.

DELTA MINING, INC., G. M. W. COAL COMPANY, INC.,
AND EDWARD MEARS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals, as amended (Pet. App. A, pp. 1a–16a), is reported at 495 F. 2d 38.[1] The opinion of the district court (Pet. App. D, pp. 21a–24a) is not reported.[2]

[1] The court of appeals opinion of March 20, 1974, was amended on June 12, 1974. The amendment corrected a statement in the original opinion respecting the issuance by the Secretary of substantive guidelines for assessing civil penalties (Pet. App. A, p. 12a). See *infra*, p. 16 n. 24.

[2] Three separate enforcement proceedings were consolidated in the court of appeals. The district court opinion in *Morton* v. *G.M.W. Coal Co., Inc.*, W.D. Pa., Civ. No. 72-890, is reprinted

JURISDICTION

The judgment of the court of appeals (Pet. App. B, pp. 17a–18a) was entered on March 20, 1974. A timely petition for rehearing with suggestion of rehearing *en banc* was denied on June 4, 1974 (Pet. App. C, pp. 19a–20a). On August 23, 1974, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including November 1, 1974. The petition was filed on November 1, 1974, and was granted on January 27, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Coal Mine Health and Safety Act of 1969 requires the Secretary of the Interior to prepare a decision incorporating findings of fact before a civil penalty can be assessed against a coal mine operator, even though the operator has failed to exercise his right to an administrative hearing, and even though the penalty can be enforced only in judicial proceedings where the operator is entitled to a trial *de novo* on all disputed issues of fact.

STATUTES AND REGULATIONS INVOLVED

1. Sections 109(a)(1), 109(a)(3) and 109(a)(4) of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 756–757, 30 U.S.C. 819(a)(1), 819(a)(3) and

in Pet. App. D. The district court orders in *Morton* v. *Delta Mining, Inc.*, W.D. Pa., Civ. No. 72–857 (App. 46), and *Morton* v. *Edward Mears, et al.*, W.D. Pa., Civ. No. 72–928 (App. 117), the two other consolidated cases, granted the operators' motions for summary judgment for the reasons stated in the *G.M.W.* opinion.

819(a)(4), are set forth in the Petition at pp. 3–5, and in the Addendum to this brief (Add., pp. 4–6).

Sections 2, 104(a), 104(b), 104(e) and 104(f) of the Act, 83 Stat. 742–743, 750–752, 30 U.S.C. 801, 814(a), 814(b), 814(e) and 814(f), are set forth in the Addendum (Add., pp. 1–4).

2. 30 C.F.R. Pt. 100, as promulgated on January 16, 1971 (36 Fed. Reg. 779–780), is set forth in Pet. App. E, pp. 25a–32a. This is the regulation under which the penalties in these cases were assessed.

30 C.F.R. Pt. 100, as modified on June 15, 1972 (37 Fed. Reg. 11861–11862), is set forth in the Addendum (Add., pp. 7–13). This is the regulation the district court enjoined in *National Independent Coal Operator's Association* v. *Morton*, No. 73–2066.

30 C.F.R. Pt. 100, as reissued effective August 1, 1974 (39 Fed. Reg. 27558–27561), is set forth in Pet. App. F, pp. 33a–56a. This is the regulation now in effect.

STATEMENT

1. *The statutory scheme.* The Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U.S.C. 801, *et seq.* ("the Act"), establishes health and safety standards to protect the Nation's coal miners, and requires each operator of a coal mine and every miner to comply with such standards. Sections 2(g)(1) and (2) of the Act, 30 U.S.C. 801(g)(1) and (2). The mandatory health and safety standards are set forth in Titles II and III of the Act, 30 U.S.C. 841, 861, *et seq.* The implementing regulations are in 30 C.F.R. Pts. 70, 75 and 77. The Act requires the Secretary of

the Interior to assess and collect civil penalties for violations of these standards by coal mine operators.[3]

Section 103 of the Act, 30 U.S.C. 813, authorizes and requires representatives of the Secretary, that is, federal coal mine inspectors, to make frequent inspections of coal mines.[4] Section 104, 30 U.S.C. 814, establishes procedural mechanisms for finding and abating dangerous conditions and violations of mandatory health or safety standards in coal mines, including the issuance by federal inspectors of notices of violation

[3] The Act was passed after extensive congressional hearings into the problems of coal mine health and safety, occasioned by a coal mine disaster at Farmington, West Virginia, in November 1968 when 78 miners died. The House Report stated: "For too long the Congress has countenanced the passage of piecemeal measures which have failed to provide the Bureau with the enforcement power it needs. Too many injuries and too many lives have filled the gap left by inadequate laws. A strong law is necessary to protect the men who extract one of our Nation's most vital resources. Coal miners deserve the safest, healthiest work environment our technology will enable us to provide." H. Rep. No. 91-563, 91st Cong., 1st Sess. 6; Leg. Hist. 558, 563. The penalty provisions of Section 109 were enacted as one of the chief enforcement tools of the Act. S. Rep. No. 91-411, 91st Cong., 1st Sess. 36-39; Leg. Hist. 1, 36-39.

House and Senate debates are reprinted, along with the House, Senate and Conference reports, in a one-volume Committee Print entitled Legislative History, Federal Coal Mine Health and Safety Act, House Committee on Education and Labor, 91st Cong., 2d Sess. (cited herein as "Leg. Hist.").

[4] At the time of the events giving rise to these actions, the Act was enforced by the Secretary's delegate, the Bureau of Mines, Department of the Interior. The Bureau's safety and enforcement functions have since been transferred to a newly created Mining Enforcement and Safety Administration, Department of the Interior. 38 Fed. Reg. 18665-18668, 18695-18696 (1973).

or withdrawal orders[5] on account of such violations and conditions.[6]

Section 109(a)(1) of the Act provides that the coal mine operator shall be subject to a civil penalty not exceeding $10,000 for each violation of a mandatory health or safety standard or any other provision of the Act. In determining the amount of the penalty, the Secretary is required to consider the appropriateness of the penalty to the size of the business of the operator charged, the operator's history of previous violations, whether the operator was negligent, the effect of the penalty on the operator's ability to continue in business, the gravity of the violation, and the good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. 819(a)(1).

The provision here in issue is Section 109(a)(3) of the Act, 30 U.S.C. 819(a)(3), which provides that the Secretary may assess a civil penalty only after the person charged with the violation "has been given an

[5] If an inspection reveals a condition causing imminent danger, the coal mine inspector must order the operator to withdraw all persons from the mine or area affected until the danger is abated. Section 104(a), 30 U.S.C. 814(a). Similarly, if the operator fails to correct violations within a reasonable time, or if he repeatedly and unwarrantably permits significant violations of mandatory health or safety standards to occur, the coal mine inspector must also order that the operator withdraw all persons from the mine. Sections 104(b), 104(c), 30 U.S.C. 814(b), 814(c).

[6] Sections 104(e) and (f) require that these notices and orders be given promptly to the operator of the coal mine or his agent by the inspector, and that they be in writing and contain a detailed description of the conditions or practices constituting the condition or violation (Add., p. 4).

opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating when appropriate, an order therein requiring that the penalty be paid." The Section further requires that any hearings held under this Section shall be of record and subject to 5 U.S.C. 554 (the Administrative Procedure Act).

If the penalty is not paid, the Secretary must file a petition for judicial enforcement of the assessment order in the appropriate district court, generally the district where the mine is located. The court then determines all relevant issues *de novo,* and the operator has a right to a jury trial on any disputed issues of fact. 30 U.S.C. 819(a)(4).[7]

2. *Pertinent regulations and administrative proceedings.* The assessment orders the Secretary sought to enforce in the present cases were issued pursuant to 30 C.F.R. Pt. 100 (1972) (Pet. App. E, pp. 25a–32a).[8]

They were based on notices of violations and withdrawal orders issued to the respondents in 1971 and

[7] The mine operator is not entitled to relitigate issues of fact "which were or could have been litigated in review proceedings before a court of appeals under section 106 of [the] Act [relating to the propriety of withdrawal orders and the period of time permitted for abatement of noticed violations]." 30 U.S.C. 819(a)(4). See *infra*, p. 22 n. 27.

[8] 36 Fed. Reg. 779–780 (Jan. 1971). These regulations were modified in certain respects, not here significant, in June 1972. 37 Fed. Reg. 11861–11862, 30 C.F.R. Pt. 100 (1973) (Add., pp. 7–13).

early 1972. The notices served on Delta (Add., pp. 22–27) were typical. They charged violations of 30 C.F.R. 75.313 (1972) ("A methane monitor, approved as reliable by the Secretary, was not installed on the continuous miner in mains section," Add., p. 22); 30 C.F.R. 75.504 (1972) ("The hose conduit, used to protect the electrical wires leading from the junction box to the left cutter head motor was broken on the continuous miner," Add., p. 23); 30 C.F.R. 75.1600 (1972) ("Telephone service was not provided from the surface to the underground working section," Add., p. 24); 30 C.F.R. 75.1714 (1972) ("A self rescue device approved by the Secretary was not made available for each underground workman," Add., p. 25); 30 C.F.R. 77.400 (1972) ("The belt chain drive at the top of the storage bin was not guarded to prevent persons from coming in contact with the chain drive," Add., p. 26); and 30 C.F.R. 77.204 (1972) ("The opening around the belt drive and motor at the top of the storage bin was not covered to prevent persons from falling in the bin," Add., p. 27). See App. 28.

There were two withdrawal orders in these cases: G.M.W. received an imminent danger withdrawal order on November 21, 1971, which involved a violation of 30 C.F.R. 75.400 and 75.403 (1972), relating to a fire hazard.[9] Edward Mears received a withdrawal order on November 17, 1971, for failure to abate a vio-

[9] The order reported that "Loose coal was in excess of 3" deep for a distance of 80 ft. inby sight spad No. 160 in No. 3 Main Entry, for a distance of 80 ft. inby No. 3 Entry of 5 Left butt, in Nos. 1 and 2 Main Entries, and also for a distance of 40 feet in No. 3 Entry of 5 Left butt. The Rock dust was inadequate in the above described areas" (See App. 64, 87).

lation of the standard for respirable dust concentration, 30 C.F.R. 70.100 (1972) (App. III).

Each notice of violation and order of withdrawal served by an inspector on a coal mine operator was reviewed by an assessment officer of the Bureau of Mines, Department of the Interior, to determine the liability of the operator for a civil penalty, and the amount of the penalty to be proposed. 30 C.F.R. 100.4 (a) (1972). The assessment officer prepared and served a "Proposed Order of Assessment" upon the operator charged, 30 C.F.R. 100.4(b)(1) (1972), which specified the notice of violation (or withdrawal order) in question, and stated the amount of the proposed civil penalty. 30 C.F.R. 100.4(b)(2) (1972) (App. 9, 58, 61, 64, 108, 111).

The Part 100 procedures stated that, in determining the amount of the proposed penalty for an operator, the assessment officer was required to consider all relevant circumstances, "including the operator's history of previous violations, the appropriateness of such penalty to the size of the operator's business, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of violation." 30 C.F.R. 100.4(c) (1972); 30 C.F.R. 100.2(a) (1972). These are the six statutory factors that Section 109(a)(1) of the Act, 30 U.S.C. 819(a)(1), directs the Secretary to consider. Each proposed order indicated that the factors had been considered (see *e.g.*, App. 9, 61, 64).

Section 100.2(b) of the regulations stated that the amount of the proposed civil penalty "shall be within

guidelines established by the Secretary (see Appendix A to this part) and revised periodically in the light of experience gained under the Act * * *." 30 C.F.R. 100.2(b) (1972).[10] Appendix A at the time of the violations in these cases[11] provided for a range between $5,000 and $10,000 for violations resulting in the issuance of imminent danger withdrawal orders (under Section 104(a) of the Act); a range between $1,000 and $5,000 for violations resulting in the issuance of other withdrawal orders (under Sections 104 (b), (c), (h) and (i) of the Act); a range between $100 and $1,000 for "serious violations"; and a range between $25 and $500 for other violations.[12] The operators were advised when they received the proposed orders that they had 15 working days from the receipt

[10] A proviso stated that a particular violation may warrant proposing a civil penalty more than or less than the range set forth in the guidelines. 30 C.F.R. pt. 100, Appendix A (1972).

[11] Appendix A to Part 100 was modified in June 1972. See 37 Fed. Reg. 11460, 11862 (Add., p. 13).

[12] The major proposed penalties here involved were $5,000 for a violation by G.M.W. Coal Co., Inc., resulting from an imminent danger withdrawal order, and $1,000 for a violation by Edward Mears, *et al.*, resulting from a withdrawal order. In addition, the Secretary proposed penalties ranging from $30 (for the failure to provide phone service to the working section) to $90 (for the unguarded belt chain drive) on the 6 notices of violation issued to Delta Mining; ranging from $25 to $100 on 10 notices of violation issued to G.M.W. Coal Co., Inc.; and ranging from $25 to $100 on 16 notices of violation (and $200 on a 17th) issued to Edward Mears, *et al.* The total penalties proposed were $375 against Delta, $5,525 against G.M.W., and $2,000 against Mears. After protest, one G.M.W. penalty was reduced from $100 to $50. See App. 9, 58, 61, 64, 108, 111.

of the order to "protest the proposed assessment, either partly or in its entirety." 30 C.F.R. 100.4(d) (1972).[13] If the operator failed to make a timely protest, he was deemed to have waived his right of protest, including his right of formal adjudication and opportunity for hearing, and the proposed assessment order became the final assessment order of the Secretary. 30 C.F.R. 100.4(e) (1972).

Each of the operators in this case protested[14] and the assessment officer reconsidered and reissued the proposed orders. 30 C.F.R. 100.4(g) (1972).[15] The operators again had 15 working days from receipt of the amended or reissued proposed order "to accept the amended or reissued order, whereupon it shall become the final assessment order of the Secretary, or to request formal adjudication with opportunity for hearing." 30 C.F.R. 100.4(h) (1972).[16] Since none of

[13] This period was changed to 20 consecutive days in the June 1972 amendment. 30 C.F.R. 100.3(d) (1973).

The amendment also added the words "or petition for hearing and formal adjudication," but under the initial regulations the operator could, in his protest, also request a hearing. 30 C.F.R. 100.4(f) (1972).

[14] Delta's protest stated, among other things, that "the subject mine is a small mine producing approximately 8,000 tons of coal monthly," and that "the proposed penalties will have an adverse effect on the operator's ability to continue in business" (Add., p. 28).

[15] The proposed penalty for one of the G.M.W. violations was reduced from $100 to $50. See note 12, *supra.*

[16] In June 1972 this provision was clarified by substituting the words "or to reject such order in whole or in part" for "whereupon it shall become the final assessment order of the Secretary"; and adding a new sentence: "Unless the operator or miner charged files a timely petition for hearing and formal

the operators in these cases requested formal adjudication within 15 working days of receipt of the amended or reissued order, the orders became the final orders of the Secretary pursuant to the regulations, and thus subject to enforcement in the district court when they were not paid forthwith.[17]

In any case in which an operator did make a timely request for a formal hearing (by so indicating in his protest, or in response to a reissued or amended proposed assessment order), the assessment officer was required to forward the matter to the Office of the Solicitor, Department of the Interior, whereupon a petition to assess a penalty would be filed by the Solicitor with the Office of Hearings and Appeals, Department of the Interior. 30 C.F.R. 100.4(i)(1) (1972); 43 C.F.R. 4.540(a) (1972).[18] The hearing would be conducted *de novo,* 30 C.F.R. 100.4(i)

adjudication an amended or reissued proposed assessment order shall become the final assessment order of the Secretary." 37 Fed. Reg. 11862 (June 15, 1972), 30 C.F.R. 100.3(h) (1973).

[17] See the "Proposed Order Affirmed" issued in the *Delta Mining* case on May 17, 1972 (Add., pp. 29–30). See also App. 30, 81; Pet. App. A, p. 5a. The administrative record in each case included formal findings by the assessment officer similar to the one in *Delta*: "I hereby find that the violations cited in the proposed order of assessment dated April 11, 1972 did, in fact, occur and accordingly adopt the assessment set forth therein as final" (App. 8, 57, 60, 63, 107, 110).

[18] The petition was required to be served on the operator who was then provided with an opportunity to answer and a public hearing. 30 C.F.R. 100.4(i)(2) (1972); 43 C.F.R. 4.541, 4.544 (1972).

The Office of Hearings and Appeals, Department of the Interior, is comprised of administrative law judges and Appeals Boards. 43 C.F.R. 4.1 (1974).

(1972); 43 C.F.R. 4.544, 4.589 (1972);[19] the Bureau of Mines (represented by the Office of the Solicitor) had the burden of proving any alleged violation of a mandatory health or safety standard by a preponderance of the evidence, 43 C.F.R. 4.587 (1972);[20] and the administrative law judge was required to render a decision incorporating findings of fact and conclusions of law, 30 C.F.R. 100.4(i)(3) (1972), 43 C.F.R. 4.593 (1972). The decision was subject to review by the Secretary's delegate, the Board of Mine Operations Appeals. 43 C.F.R. 4.1(b)(4), 4.500(a)(2), 4.600 (1972).[21]

Whether or not the operator has requested formal adjudication, he may obtain *de novo* judicial review of the penalty by not paying it and awaiting the Secretary's enforcement action in the district court. 30 U.S.C. 819(a)(4).

3. *District court proceedings.* The Secretary filed complaints against each of the respondents in October and November, 1972, alleging that the assessments in question had become final in the absence of requests for hearing; that the assessments had not been paid; and praying for judgment in the amount of each as-

[19] The hearing examiner was free to assess a different penalty, and was not bound by the prior proposed penalty or by the guidelines in Appendix A of Part 100.

[20] A June 1972 amendment to this section states explicitly that "in a penalty proceeding the Bureau shall have the burden of proving its case by a preponderance of the evidence * * *." 43 C.F.R. 4.587(a) (1973).

[21] These formal hearing procedures are for the most part the the same under the present regulations of the Secretary. See 39 Fed. Reg. 27561, 30 C.F.R. 100.7 (Pet. App. F, pp. 54a–55a); 43 C.F.R. 4.540, *et seq.* (1974).

sessment order (App. 5, 54, 104). Each of the respondent mine operators answered the complaint against it, denying liability (App. 10, 65, 113).

At a pre-trial conference held on February 14, 1973, before Judge Gourley in the *Delta Mining* and *G.M.W.* cases (which had been consolidated), the parties submitted a joint stipulation of facts (App. 18–19), and argued the legality of the Secretary's assessment procedures. Judge Gourley concluded that the Secretary's procedures were in compliance with the law, and that the two cases should be severed and set for separate *de novo* trials at which the government would have an opportunity to "prove [its] whole case" (App. 41–42). Judge Gourley then vacated the order consolidating the two cases (App. 44), and transferred both to Judge Sorg for trial (App. 45).

On March 9, 1973, while these cases were awaiting trial before the district court, the United States District Court for the District of Columbia enjoined the Secretary of the Interior from utilizing or enforcing the assessment procedures of Part 100, concluding that Section 109(a)(3) of the Act requires the Secretary to prepare a decision incorporating findings of fact in all penalty assessment determinations, whether or not a hearing is requested. *National Independent Coal Operators Association* v. *Morton,* 357 F. Supp. 509 (hereafter referred to as the "*NICOA*" case). As a result of this injunction, the Secretary suspended Part 100 on April 24, 1973, and replaced it with interim formal hearing pro-

cedures for all cases, pending an appeal of the *NICOA* decision. 38 Fed. Reg. 10085, 10086–10087.

On the basis of the district court decision in *NICOA*, the respondent mine operator in the *G.M.W.* case moved for summary judgment, contending that the Secretary's assessment orders were unenforceable since there had been no "decision incorporating * * * findings of fact" (App. 78–80). Agreeing with the district court's decision in *NICOA*, Judge Sorg concluded that the penalty assessment orders sought to be enforced did not comply with the requirement of Section 109 (a)(3) of the Act, since they did not set forth adequate findings of fact (Pet. App. D, pp. 21a–24a). The district court accordingly entered judgment in favor of the respondent mine operators in all three cases (App. 46, 52, 117).

4. *Appellate decisions.* The Secretary appealed the district court judgments in both circuits, arguing that Section 109(a)(3) requires a decision incorporating findings of fact only when the operator has requested formal adjudication and a hearing has been held. The Secretary also argued that, in any event, the availability of *de novo* judicial review in the district court enforcement action cures any shortcomings of this sort in the administrative procedures.

On February 11, 1974, the United States Court of Appeals for the District of Columbia Circuit reversed the district court's decision in *NICOA*, concluding that Section 109(a)(3) "does not require the Secretary to prepare a formal decision unless the mine operator exercises his right to request formal adjudication."

NICOA v. *Morton*, 494 F. 2d 987, 994 (C.A.D.C.) (Pet. App. G, pp. 57a–73a, 73a).[22]

The decision of the court of appeals in *NICOA* was brought to the attention of the court below, but that court declined to follow it. In its decision of March 20, 1974, it held that the language of Section 109(a)(3) requires the Secretary to accompany each final assessment order with a decision incorporating findings of fact regarding the fact of violation and the amount of the penalty, "whether or not the operator requests a hearing" (Pet. App. A, pp. 9a, 16a). The court recognized the Secretary's concern "that a requirement of findings in every case may hobble efforts at effective enforcement of the Act's penalty provisions"; it nevertheless concluded that it would be inappropriate "to substitute for Congress' directive the Secretary's, or our own, notions of how best to administer the Act" (*id.* at p. 13a).

In a footnote, the court of appeals stated that it had "considered and rejected" the Secretary's alternative argument that the *de novo* enforcement procedure in the district court cured any defects in the findings of fact accompanying the administrative assessment order (*id.* at p. 16a n. 32).[23]

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[22] This Court granted the Coal Association's petition for a writ of certiorari in that case, No. 73–2066, on January 27, 1975, and consolidated it with the present case for argument.

[23] On January 14, 1975, the District Court for the Eastern District of Kentucky concluded that an assessment order issued under the 1972 procedures complied with Section 109(a)(3), since it contained adequate findings of fact concerning the occurrence of the violation. *Morton* v. *Whitaker*, Civ. No. 74–96 (Add., pp. 14–18).

5. *Reissuance of Part 100 with substantive assessment guidelines.* A revised Part 100 became effective on August 1, 1974. 39 Fed. Reg. 27558–27561 (Pet. App. F, pp. 33a–56a). This current regulation establishes an "assessment formula" for determining proposed penalties under the criteria set forth in Section 109(a)(1) of the Act. Under this system, all proposed assessments are now accompanied not only be a recitation of the notice of violation and the amount of the penalty, but also by formula determinations ("penalty points") pertaining to each of the six statutory criteria.[24]

SUMMARY OF ARGUMENT

The court below concluded that Section 109(a)(3) of the Federal Coal Mine Health and Safety Act requires that all final assessment orders must be accompanied by findings of fact supporting the determination that the violation did occur and that the penalty assessed is appropriate. But we submit that the court of appeals in the *NICOA* case correctly read that Section as requiring such findings of fact only when a formal hearing has been held.

Section 109(a)(3) is designed to provide the operator with the opportunity for a public hearing; its provisions should be read in the light of that purpose as descriptive of the procedures which follow such a request. This reading of the Section is required by the provisions of both the House and Senate bills from which it is derived; the question at issue here arises only because limiting language in both provisions was deleted in conference. That deletion does not indicate an intent to make a substantive change in the requirement for findings.

None of the traditional reasons for requiring findings of fact in administrative proceedings applies when the operator chooses not to request a hearing, and the assessment can be enforced only after *de novo* judicial consideration. The operators have a right to be informed in every case, whether a hearing is requested or not, of the precise violation to which the assessment relates, and they have always been so informed. There is no similar need for detailed information supporting the appropriateness of the amount of the penalty assessed. Indeed, in regard to almost all of the violations involved here minimal penalties were assessed and we see no reason why the detailed information would be useful to the operators.

Finally, the operators' failure to request a hearing is equivalent to a default at the administrative level. There is nothing to indicate that Section 109(a)(3) was designed to preclude the enforcement of penalty assessment orders based on final administrative determinations resulting from express agreement or reasonable default procedures, either before or after a request for a hearing, without a decision incorporating findings of fact.

[24] Under the reissued Part 100, as in the case of the former Part 100, the operator's failure to request a hearing within a specified time (now 30 days) after service of a proposed assessment order (and opportunity for a conference) will result in a final assessment order enforceable in the district courts. 30 C.F.R. 100.4(c) (Pet. App. F, p. 51a).

The "assessment formula" system of assessing penalties was first developed in somewhat different form in April 1973, and was utilized thereafter in connection with interim formal hearing procedures until Part 100 was reissued effective August 1, 1974. See 38 Fed. Reg. 10086 (Apr. 24, 1973). See also *NICOA* v. *Morton*, 494 F. 2d 987, 989 n. 12 (C.A.D.C.) (Pet. App. G, p. 61a n. 12).

ARGUMENT

SECTION 109(a)(3) OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969 DOES NOT REQUIRE THE SECRETARY OF THE INTERIOR TO PREPARE A "DECISION INCORPORATING * * * FINDINGS OF FACT" IN A CIVIL PENALTY ASSESSMENT CASE IN WHICH THE COAL MINE OPERATOR FAILS TO REQUEST AN ADMINISTRATIVE HEARING

At issue in these cases is the meaning of the requirement in Section 109(a)(3) of the Federal Coal Mine Health and Safety Act for a "decision incorporating his findings of fact therein * * *." According to the court of appeals in this case the language requires that all final assessment orders be accompanied by findings of fact supporting the conclusion that the violation did occur and supporting the application of the statutory criteria for determining the amount of the penalty (Pet. App. A, pp. 9a, 13a). The court of appeals in the *NICOA* case disagreed, reading Section 109(a)(3) as descriptive of the formal adjudicative process available upon the mine operator's request; it thus concluded that the disputed phrase simply described the procedures ancillary to the requested hearing (Pet. App. G, pp. 65a, 68a). This is, we believe, the correct construction in light of the wording and context of Section 109(a)(3), the legislative history of that Section, and the underlying purpose of the Section and the Act.

A. THE WORDING AND CONTEXT OF SECTION 109(a)(3) SUPPORT THE CONCLUSION THAT THE REQUIREMENT FOR DECISIONS INCORPORATING FINDINGS OF FACT IS ANCILLARY TO THE HEARING REQUIREMENT.

We begin, as we must, with the language of Section 109(a)(3):

> A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. Where appropriate, the Secretary shall consolidate such hearings with other proceedings under section 105 of this title. Any hearing under this section shall be of record and shall be subject to section 554 of title 5 of the United States Code.

The court below thought that the "plain import" of the statute is that whenever the Secretary assesses a civil penalty this must be done in a decision incorporating findings of fact that a violation did occur and that the penalty assessed is warranted (Pet. App. A, p. 9a).

In our view, however, the statutory language requires a decision incorporating findings of fact only when the mine operator has taken advantage of his "opportunity for a public hearing." The language following that phrase, rather than imposing a general requirement applicable to the assessment of all penalties, simply describes the nature of the formal adjudication that must take place when a hearing is requested. Thus, when a public hearing is held, the operator is entitled to a determination, by "decision incorporating * * * findings of fact," that the violation occurred and that the penalty is warranted. The decision resulting from the hearing, if adverse to the operator, will include an order that the penalty be

paid. And the hearing must be of record and subject to 5 U.S.C. 554.[25]

This, we believe, is the more natural reading of the Section. The phrase "a decision incorporating his findings of fact" traditionally refers to the end product of the public hearing conducted in conformity with Section 5 of the Administrative Procedure Act (APA), 5 U.S.C. 554, namely, a decision containing "specific and detailed findings and conclusions of the kind customarily associated with formal proceedings." *Automotive Parts & Accessories Association* v. *Boyd,* 407 F. 2d 330, 337 (C.A.D.C.).

On the other hand, the court of appeals thought that the reference in Section 109(a)(3) to Section 5 of the APA "tends to indicate that findings are required when a violator does not seek a hearing as well as when he does" (Pet. App. A, p. 10a). Otherwise, the court stated, the "findings of fact" phrase would be surplusage because Section 5 of the APA also requires the decisionmaker to make such findings after a hearing.[26] The court therefore concluded that the canon against construing statutory language to be mere surplusage supported its interpretation.

It is difficult to see the force of this. In the first place, it is hardly clear that the "findings of fact" lan-

[25] 5 U.S.C. 554, originally Section 5 of the Administrative Procedure Act, establishes general rules for formal administrative adjudications, including notice of hearing, Section 554(b); consideration of facts and arguments, and issuance of a decision in the absence of settlement by consent, Section 554(c); and rules applicable to the decision maker, Section 554(d).

[26] Actually, Section 5 of the APA does not itself state that the decision maker shall make findings of fact; the requirement is derived from Section 8 of the APA (5 U.S.C. 557(c)), which Section 5(d) refers to (see p. 21, *infra*).

guage in Section 109(a)(3) is here surplusage unless it applies when no hearing is held. Congress could have thought that if it had simply referred to Section 5 of the APA without more, findings of fact *after a hearing might not be required.* Section 5 of the APA does not mention findings of fact, but in subsection (c) refers to Section 8 of the APA (5 U.S.C. 557), which requires such findings for hearings in accordance with Section 7 (5 U.S.C. 556). But Section 7 applies only to hearings required by Section 5 and in this situation the hearings are required instead by the Federal Coal Mine Health and Safety Act. (Section 5 would not have required a hearing on the Secretary's assessment order for the reasons set forth below.)

Moreover, the court approached the inquiry from the wrong angle. Given the structure of Section 109 (a)(3), the question should have been why Congress invoked Section 5 of the APA at the end of Section 109(a)(3) after it had already required an opportunity for a hearing and findings of fact.

Had the court asked that question, the answer would have been apparent. Section 5 of the APA sets forth a number of procedural requirements relating to notice, pleadings, time and place of the hearing, and the qualifications of the presiding officer, none of which are even touched upon in Section 109 (a)(3) of the Act at issue here. By referring to this provision of the APA, Congress thus made these procedures—and the considerable body of judicial opinions interpreting them—applicable when hearings are held.

In order to accomplish this aim, Congress had to refer expressly to Section 5 of the APA since it

otherwise would not have applied. Section 5 of the APA, 5 U.S.C. 554(a)(1), provides that the Section applies to every case of adjudication required to be determined on the record after an agency hearing except to the extent there is involved "a matter subject to a subsequent trial of the law and facts de novo in a court." Yet Section 109(a)(4) of the Federal Coal Mine Health and Safety Act, 30 U.S.C. 819(a)(4)—which immediately follows the provision in question here—provides for a trial *de novo* of all relevant issues pertaining to the imposition and amount of a civil penalty when the Secretary sues for enforcement.[27] Upon request of the mine operator in such a trial, disputed issues of fact shall be submitted to a jury. In light of this, the striking feature of Section 109 in general is that mine operators are even given the opportunity for a hearing before the Secretary, which is a departure from traditional administrative practice when trial *de novo* is available (see p. 6, *supra*).[28]

[27] The mine operator is not entitled to relitigate issues of fact "which were or could have been litigated in review proceedings before a court of appeals under section 106 of [the] Act." Section 109(a)(4), 30 U.S.C. 819(a)(4). Thus, where an operator has previously filed a petition for review in a court of appeals under Section 106 of the Act, all issues which were or could have been litigated by the operator in that proceeding are *res judicata* in any subsequent penalty enforcement proceedings when the court of appeals judgment becomes final. See H. Conf. Rep. No. 91-761, 91st Cong., 1st Sess., 71-72; Leg. Hist. 1033-1034.

In the present cases, none of the respondent operators filed such petitions for review relating to the facts involved in the present enforcement actions; thus this limitation on *de novo* judicial review under Section 109(a)(4) has no application here.

[28] Indeed, where *de novo* judicial review is available before taxes or assessments must be paid, this Court has rejected the

Although the opportunity for a hearing afforded by Section 109(a)(3) perhaps can be explained on the basis of Congress' desire to have disputes settled at the administrative level, it is difficult to imagine why Congress would have required the Secretary to make findings of fact when the operator failed even to request an administrative adjudication. Indeed, if Section 109(a)(3) meant—which it does not—that findings of fact must accompany assessment orders despite the operator's failure to invoke the hearing process, it would still be at least arguable that, even in the absence of such findings, the orders are nevertheless enforceable. It is hardly apparent that the operator suffers any prejudice by the lack of findings in this situation, and the general rule is that procedural defects at one level are not fatal when *de novo* review is available at another level. See *Pittsburgh S.S. Co.* v. *Brown*, 171 F. 2d 175, 178 (C.A. 7); *Jordan* v. *American Eagle Fire Ins. Co.*, 169 F. 2d 281, 290 (C.A.D.C.).[29]

While we therefore believe that the court below erred in interpreting Section 109(a)(3), and that the Sec-

contention that any hearing at all must be held at the administrative level to satisfy due process. See *Nickey* v. *Mississippi*, 292 U.S. 393, 396; *Hagar* v. *Reclamation District No. 108*, 111 U.S. 701, 710-712. Cf. *Rowan* v. *Post Office Dept.*, 397 U.S. 728, 738-739; *Lichter* v. *United States*, 334 U.S. 742, 791-792.

[29] Administrative findings become immaterial when there is a *de novo* trial in court. *Pittsburgh S.S. Co.* v. *Brown*, *supra*, 171 F. 2d at 178. It is therefore difficult to see the relevance of the statement by the court below (Pet. App. A, p. 11a) that "[j]udicial review of a final administrative determination is heralded as a right, and such review is rendered practically impossible, or at least vastly more difficult, where the agency's decision is not accompanied by express findings."

retary's reading is the correct one in light of the language and context of the statute, we are content to assume [30] that Section 109(a)(3) is reasonably susceptible of either meaning and that we must look elsewhere for help. "Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived * * *." *United States* v. *Fisher*, 2 Cran. 358, 386 (Marshall, C.J.).[31]

B. THE LEGISLATIVE HISTORY OF SECTION 109(a)(3) CONFIRMS THAT FINDINGS OF FACT ARE REQUIRED ONLY WHEN A HEARING IS REQUESTED AND HELD.

The legislative history of Section 109(a)(3) indicates that Congress intended to require decisions incorporating findings of fact only when a hearing had been requested and held. Section 109(a)(3) reached its present form as a result of a compromise between the slightly different Senate and House bills.

The relevant language of the House bill, Section 109 (b) of H.R. 13950, 91st Cong., 1st Sess., provided (115 Cong. Rec. 32064; Leg. Hist. 932):

> Upon written request made by an operator within thirty days after receipt of an order assessing a penalty under this section, the Secretary shall afford such an operator an opportunity for a hearing *and, in accordance with the request, determine by decision* whether or not a violation did occur or whether the amount of the penalty is warranted or should be compromised. [Emphasis added.] [32]

Similarly, the Senate bill, Section 308(a)(3) of S. 2917, 91st Cong., 1st Sess., provided (115 Cong. Rec. 28256; Leg. Hist. 546):

> An order assessing a civil penalty under this subsection shall be issued by the Secretary only after the person against whom the order is issued has been given an opportunity for a hearing and the Secretary has determined by decision incorporating findings of fact *based on the record of such hearing* whether or not a violation did occur and the amount of the penalty, if any, which is warranted. Section 554 of title 5 of the United States Code shall apply to any such hearing and decision. [Emphasis added.][33]

Under either the Senate or House version of what became Section 109(a)(3), a decision incorporating findings of fact would have been required only when a

[30] As did the court of appeals in *NICOA*: "Section 109(a)(3) is logically capable of two different constructions." Pet. App. G, p. 64a.

[31] Concluding that the "plain import" of Section 109(a)(3) was that the Secretary must make findings of fact to accompany every final assessment order, the court below questioned whether it was "even appropriate" to resort to legislative history (Pet. App. A, p. 9a and n. 15). But as Mr. Justice Holmes observed in *Boston Sand & Gravel Co.* v. *United States*, 278 U.S. 41, 48, the plain meaning doctrine "is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." Here, such evidence does exist, as we next discuss.

[32] The House Report explained the purpose of this subsection simply by stating that it "gives the operator an opportunity to obtain a hearing before the Board [Federal Coal Mine Health and Safety Board of Review] before being required to comply with an order assessing a penalty." H. Rep. No. 91-563, 91st Cong., 1st Sess. 37; Leg. Hist. 558, 594.

[33] As we discussed above, the court of appeals sought to support its interpretation of Section 109(a)(3) by stating that Congress would not have made the finding of fact requirement applicable only to decisions after hearings, since the reference to 5 U.S.C. 554 would have been sufficient to impose such a requirement (Pet. App. A, p. 10a). But it is evident that the Senate bill, from which Section 109(a)(3) is derived, contains precisely that duplication—if it is one.

hearing was held. The Conference Committee adopted the Senate version, making minor changes in the Senate language. It also deleted the italicized portion of the Senate provision, thus creating the ambiguity in the final Act which is the subject of this lawsuit. But there is nothing to indicate that by this deletion, the Committee intended to change the substantive provisions of the two bills in this regard. Instead, the Committee apparently considered the deleted language unnecessary to express the common intention of both House and Senate versions of the Section.[34]

This interpretation is supported by the Conference Report, which notes:

> Both the Senate bill and the House amendment provided an opportunity for a hearing in assessing such penalties, but the Senate bill required a record hearing under 5 U.S.C. 554. The conference substitute adopts the Senate provision with the added provision that, where appropriate, such as in the case of an appeal from a withdrawal order, an effort should be made to consolidate the hearings. * * *

H. Conf. Rep. No. 91–761, 91st Cong., 1st Sess. 71; Leg. Hist. 963, 1033.

[34] See *NICOA* v. *Morton*, Pet. App. G, p. 71a. In *Burlington Truck Lines* v. *Iowa Employ. Sec. Comm'n*, 239 Iowa 752, 32 N.W. 2d 792, 797, the court stated: "The fact that the original draft of a bill contains language that is omitted in the final draft does not of necessity mean that the intent of the omitted portion is not still embodied in the bill as passed. The language may have been omitted because deemed unnecessary to a clear expression of the intent. Its omission is as consistent with that theory as with one that assumes the intent itself was abandoned. * * * This is especially true where (as here) the final draft is fairly susceptible of an interpretation consonant with the thought of the omitted part."

Indeed, there would be substantial doubt whether the Conference Committee had the authority to add a requirement, present in neither the House nor Senate bill, that findings of fact must be incorporated in decisions even in the absence of a hearing. Conference Committees are appointed to resolve differences between the bills committed to them; they are not authorized to make changes on matters regarding which both bills are in agreement. 2 U.S.C. 190c(a) (Senate conference reports); Rule XXVIII(3), Rules of the House of Representatives and § 546, Jefferson's Manual, H. Doc. No. 384, 92d Cong., 2d Sess. 526, 270–271.[35]

The language of the present Section 109(a)(3), as it emerged from the Conference Committee, must therefore be read as consistent with the provisions of the bills submitted to conference, which required findings of fact only after a hearing has been conducted.

C. IN LIGHT OF THE PURPOSES OF SECTION 109(a)(3), CONGRESS COULD NOT HAVE INTENDED TO REQUIRE FINDINGS OF FACT IN THE ABSENCE OF A REQUEST FOR A HEARING.

That Section 109(a)(3) requires a decision incorporating factual findings only after a hearing, as the legislative history indicates, is an interpretation consistent with the purposes served by findings of fact. On the other hand, to require such findings to be in-

[35] Even if the Conference Committee, appointed to resolve the differences between the Senate and House bills, had deemed it appropriate to add a requirement present in neither bill, it surely would not have done so without some express comment identifying the new requirement. Still less would it have done so while indicating that it was adopting the Senate version of the Section (*NICOA* v. *Morton*, Pet. App. G, p. 71a).

corporated in a decision even when the operator chooses not to invoke the hearing process, would impose an administrative burden far out of proportion to any benefits gained—a result Congress could not have intended.

Congress requires administrative findings for a number of practical reasons, such as facilitating judicial review, avoiding judicial usurpation of administrative fact finding functions, assuring more careful administrative consideration, helping parties plan their cases for rehearing or judicial review, and keeping agencies within their jurisdiction. Davis, *Administrative Law Treatise,* § 16.05, pp. 444–449 (1958 ed.).[36]

Here Congress' purposes in requiring administrative fact finding are adequately served by providing a full hearing followed by a formal decision whenever the mine operator requests it, and by providing *de novo* judicial consideration in enforcement proceedings. The provision that judicial review is *de novo* renders irrelevant the problem of judicial usurpation

[36] Most of the decided cases discussing the reasons for findings of fact have arisen in the context of discussions relating primarily to the adequacy of required hearings. Davis, *Administrative Law Treatise*, § 16.00, p. 559 (1970 Supp.). *E.g., Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 94; *Capital Transit Co.* v. *Public Utilities Comm'n*, 213 F. 2d 176, 182–184 (C.A.D.C.), certiorari denied, 348 U.S. 816; *National Labor Relations Board* v. *Metropolitan Ins. Co.*, 380 U.S. 438; *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167–169; *Phelps Dodge Corp* v. *National Labor Relations Board*, 313 U.S. 177, 197; *D.C. Federation of Civic Ass'ns* v. *Volpe*, 459 F. 2d 1231, 1242–1243 (C.A.D.C.); *Greater Boston Television Corp.* v. *Federal Communications Commission*, 444 F. 2d 841, 851–853 (C.A.D.C.), certiorari denied, 403 U.S. 923; *Rayonier Incorporated* v. *National Labor Relations Board*, 380 F. 2d 187 (C.A. 5); *Coffey* v. *Jordan*, 275 F. 2d 1 (C.A.D.C.).

of administrative fact finding, and substantially eliminates the function of the administrative decision in facilitating judicial review. To the extent that the operator wishes to use the agency decision to help him prepare for judicial review, he may obtain a detailed statement of the agency's findings and conclusions by requesting a hearing. Similarly, careful administrative consideration and the avoidance of actions outside agency jurisdiction are assured by the ready availability to the operator of a formal hearing at which the agency will be required to prove its case. Finally, the factor of planning for a rehearing is not involved where an *initial* formal hearing has not been held. The initial informal procedures are simply a preliminary procedural step; if the operator is dissatisfied with the result, he may put the Secretary to his proof in a formal hearing, at which he is in no worse position than one facing the typical adverse agency action.

On the other hand, it would impose a substantial administrative burden on the Secretary to require a decision incorporating findings of fact—relating not only to the occurrence of the violation, but also to the factors underlying the penalty assessment—when no hearing has been requested. Approximately 80,000 notices of violation and 5,000 withdrawal orders are issued to coal mine operators each year, and the Act requires that a penalty be assessed for each violation. Thus, Congress could not have intended to require a formal decision with findings of fact in each uncontested case since such a requirement would certainly

render effective enforcement of the penalty provisions of the Act vastly more difficult.[37]

As Congress was doubtless aware, this would be particularly undesirable in the context of this Act, the underlying purpose of which is to protect the safety of coal miners. The penalty provisions of Section 109, one of the chief enforcement tools of the Act (S. Rep. No. 91-41, 91st Cong., 1st Sess. 36-39; Leg. Hist. 1, 36-39), should not be interpreted so as to increase substantially the difficulty of implementing them effectively without serving the legitimate procedural interests of the coal mine operators.[38]

[37] As noted *supra*, p. 16, the Secretary has, in response to the *Delta Mining* decision, instituted a formula system for assessing penalties, and thus in all cases now advises the operator of the basis for the amount of penalty assessed. We would argue that this constitutes a "decision incorporating * * * findings of fact" as required by the court of appeals' interpretation of Section 109(a)(3). But in anyevent, whether an assessment order should be enforced by the court should depend on the evidence adduced at trial, not on whether the Secretary's "findings" in the absence of a hearing were sufficiently detailed. Moreover, although the present formula system may obviate the problem in this case for the future, it does not affect the enforceability of assessments made under the earlier Part 100 procedures. As to those assessments we would stress that Congress did not mandate a formula system in administering Section 109(a). Still less did it require the Secretary to issue *ad hoc* written explanations in every uncontested case.

[38] The court of appeals' belief that its interpretation was necessary to prevent arbitrary administrative action (Pet. App. A, p. 11a) is incorrect, since the operator who believes he is being treated arbitrarily can always request a hearing and decision before a final assessment order, and cannot in any event be made to pay a penalty except by a judicial enforcement proceeding in which he has the right to *de novo* review. Cf. *Farncomb* v. *Denver*, 252 U.S. 7, 11-12; *Palmer* v. *McMahon*, 133 U.S. 660, 668-669. Compare *Fuentes* v. *Shevin*, 407 U.S. 67; *Goldberg* v. *Kelly*, 397 U.S. 254; *Saxton Coal Mining Co.* v. *National Bituminous Coal Comm'n*, 96 F. 2d 517 (C.A.D.C.).

Nor is the cost and inconvenience to the operator of a formal administrative hearing a legitimate reason for requiring the Secretary to prepare formal findings when no such hearing is requested. Instead, the operator's alternative of accepting the proposed penalty assessment or challenging it in administrative proceedings is entirely adequate to protect his interest (see *infra*, pp. 34-47). If an operator, following a protest, is still dissatisfied with a proposed penalty, he should request a hearing at which specific evidence relevant to the imposition and amount of penalty may be adduced. Only then will there be a suitable record developed upon which a "decision incorporating * * * findings of fact" may be based.

[39] It is evident that the operators in these cases knew precisely the violations with which they were charged. (See App. 9, 28, 58, 61, 64, 69-70, 108, 111).

[40] There was one $200 assessment. See note 42, *infra*.

To be sure, the operator should be entitled in every case, whether a hearing is requested or not, to be informed of the violation for which the penalty is assessed. But a decision incorporating findings of fact is not necessary for this purpose. The proposed notices of assessment provide such information in all cases by identifying specifically each notice of violation upon which they are based.[39]

Beyond this, there is no reason why the operator who does not desire a hearing should be entitled to findings of fact setting forth the basis for the Secretary's exercise of his discretion in determining the appropriate penalty. In all but three of the assessments for individual violations in these cases, the amount of the proposed, and final, administrative penalty assessment was between $25 and $100,[40] although a penalty of up to $1,000 would have been within the regulatory guidelines for serious violations, and up to

$500 for nonserious violations. 30 C.F.R. Pt. 100, Appendix A (1972) (Pet. App. E).[41]

The remaining violations in these cases were assessed at $5,000 and $1,000. The $5,000 assessment was against G.M.W. for a violation resulting in an imminent danger withdrawal order (App. 64). Under the guidelines, which reflected the gravity of the violation (Section 109(a)(1)), such a violation was normally initially assessed at a range between $5,000 and $10,000. The $1,000 assessment against Edward Mears, *et al.*, was related to a violation of the ~~reparable~~ dust concentration standard, which resulted in a withdrawal order under Section 104(i) of the Act (App. 111). Under the guidelines in Appendix A, the minimum penalty suggested for this type of violation was $1,000.

In all of these instances, therefore, it is evident that the Secretary's findings would simply have explained why he exercised his discretion in favor of leniency to the coal mine operator[42] by imposing penalties at the lower limits permitted by the guidelines.[43] Requir-

[41] These cases involve 33 notices of violation (see n. 12, *supra*). Final assessments of $100 were made in 6 of them: 5 of these violations were evidently serious, as was the one on which an assessment of $200 was made. Thus, the penalties for these 5 violations were in the lower range of the penalties.

The classification of violations as 'serious' and 'nonserious' was deleted in the June 1972 revisions of the regulations.

[42] The only possible exceptions in 35 violations are the $200 penalty assessed against Mears for failure to timber the roof at several entrances to its mine (App. 108), and one $100 penalty assessed against G.M.W.

[43] Specifically, it appears in these cases that there was no significant history of previous violations, and that the operator abated the violations within the time permitted. The appropriateness of the penalties to the size of the business of the operator, and the effect of the penalties on the operator's ability to continue in business were apparently not applied adversely, and the gravity and negligence factors were evidently applied with overall leniency.

ing the disclosure of the factual basis on which he acted in making these decisions would not have aided the operators in challenging these assessments."

Of course, when the Secretary assesses penalties which are not at the lower levels of those permitted under published guidelines, the operator may wish to know more about the way in which the Secretary applied the statutory criteria. In those cases, the

The Secretary published proposed rule making in August 1972 which would have strengthened the preliminary procedures of Part 100, particularly in regard to evaluation of the six statutory factors governing the size of the penalty. See 37 Fed. Reg. 17395–17396 (Aug. 26, 1972). Interested persons were invited to submit written comments, suggestions or objections. As a result of the comments received the proposed amendments were revised in their entirety. 37 Fed. Reg. 24828–24830 (Nov. 22, 1972). The proposed revision was not adopted, partly because of the pending litigation in the *NICOA* case. The "assessment formula" system was later developed as the most satisfactory method of making proposed penalty assessments. See *supra*, p. 16.

[44] The penalty assessments at issue here are typical in this respect. The Department of the Interior has advised us that in a random sampling of 50 enforcement actions pending in the district courts, involving final assessments under the old Part 100 for 484 individual violations, the amount of the final assessment and number of violations were as follows:

Amount of assessment	*Number of violations*
$25 or less	207
$26 to $50	87
$51 to $100	75
$101 to $500	96
$501 to $1,000	5
$1,000 to $2,000	3
Over $2,000	11
Total	484

operator can obtain that information by requesting a hearing and putting the Secretary to his proof. But in the substantial numbers of cases[45] in which the size of the penalty itself indicates that the criteria were applied favorably, requiring findings showing the factors underlying the Secretary's decision to be lenient does not serve any interest of the operator. It merely imposes an unnecessary administrative burden on the Secretary.

Accordingly, it is not surprising that the Secretary has not read Section 109(a)(3) as requiring such findings where a hearing is not requested. But each proposed assessment order recites that a violation did in fact occur and refers to the notices of violation in the proposed order. To that extent, "findings of fact" are made; Section 109(a)(3) requires no more. This contemporaneous construction of the statute by the agency charged with its administration is of course entitled to great deference. See *Udall* v. *Tallman,* 380 U.S. 1, 16.

D. IN ENACTING SECTION 109(a)(3), CONGRESS DID NOT INTEND TO MODIFY THE GENERAL RULE THAT ADMINISTRATIVE DISPUTES MAY BE EFFECTIVELY RESOLVED, WITHOUT A HEARING OR FINDINGS OF FACT, BY EXPRESS SETTLEMENT OR BY REASONABLE DEFAULT PROCEDURES.

In the *NICOA* case, *supra,* the court of appeals observed that in situations where a statute requires a hearing prior to agency action, the courts have held that the agency need not conduct a hearing if no disputed issue of material fact exists (Pet. App. G, pp. 66a–67a). *E.g., United States* v. *Storer Broadcasting Co.,* 351 U.S. 192; *Federal Power Commission* v. *Texaco,* 377 U.S. 33, 39–44. See also *Weinberger* v. *Hynson, Westcott & Dunning,* 412 U.S. 609, 620–622. The same reasoning indicates that the Secretary need not prepare a formal decision where there is no dispute and the operator evidences his satisfaction with the proposed penalty by choosing not to request a hearing (Pet. App. G, p. 68a). The mine operator should not be permitted to complain now of the lack of findings, when by simply requesting a hearing at the administrative level he would have been entitled to findings on all disputed material issues of fact and discretion.[46]

There is nothing to indicate that Section 109(a)(3) was intended to prohibit the settlement of penalty assessment cases either by reaching an express agreement on the amount of the penalty to be assessed, or by a default determination.[47] The Secretary's right to

[45] See not 44, *supra*

[46] The court below concluded that the operators sufficiently indicated their dissatisfaction with the penalties imposed here by lodging protests pursuant to 30 C.F.R. 100.4(d) and (f) (1972). (Pet. App. A, p. 15a). But the regulations provide that if the operator is still dissatisfied with the penalties assessed after his protest is considered, he may request a hearing. The operators failed to request such hearings.

[47] Where, in a formal hearing proceeding, the operator failed to file a preliminary statement or a response to a prehearing order, the hearing examiner could issue an order to show cause why the proceedings should not be summarily dismissed. 37 Fed. Reg. 11462, 43 C.F.R. 4.545(a) (June 1972). If the operator or miner failed to respond to such an order, or failed to appear at a hearing, the examiner was required to order the proceedings summarily dismissed and remanded to the assessment officer for entry of the last proposed order of assessment (issued under

utilize such procedures *after* a hearing has been requested could hardly be doubted.[48] It is clear that administrative disputes may be compromised by default or waiver of a hearing or other procedural right. There is no reason why administrative disputes may not be similarly compromised prior to the initiation of a formal hearing. See, *e.g., Lichter* v. *United States,* 334 U.S. 742, 789–793; *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U.S. 197, 226, 228; *Federal Radio Comm'n* v. *Nelson Bros. Bond & Mortgage Co.,* 289 U.S. 266, 287; *McGregor* v. *Hogan,* 263 U.S. 234, 238; *Ross* v. *Stewart,* 227 U.S. 530, 537–539; *Reetz* v. *Michigan,* 188 U.S. 505, 509.

In this respect, the provisions of Part 100 were "default" provisions, providing procedures allowing for preliminary settlement of penalty assessment cases, and "default" determinations (based on the last

30 C.F.R. Pt. 100) as the final assessment order of the Secretary. 37 Fed. Reg. 11462, 43 C.F.R. 4.545(b) (June 1972).

For the current default procedures at the formal hearing stage, see 43 C.F.R. 4.544 (1974).

[48] The relevant provisions of the Administrative Procedure Act, 5 U.S.C. 554 (expressly referred to in Section 109(a)(3) of the Federal Health and Safety Coal Mine Act) specifically encourage the settlement or adjustment of cases without hearing or decision. Section 554(c) requires the agency to give all interested parties an opportunity for—

"(1) the submission and consideration of facts, arguments, *offers of settlement, or proposals of adjustment* when time, the nature of the proceeding, and the public interest permit; and

"(2) *to the extent that the parties are unable so to determine a controversy by consent*, hearing and decision on notice and in accordance with sections 556 and 557 of this title" (emphasis added).

proposed assessment) if an operator did not request a formal adjudication. These procedures of Part 100 were reasonable and fully consistent with the policies of the Administrative Procedure Act and the Federal Coal Mine Health and Safety Act. There is nothing in the language of Section 109(a)(3) of the Coal Mine Act which indicates any congressional intent to preclude such procedures; the history and policies underlying this legislation support them.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

IRVING JAFFE,
Acting Assistant Attorney General.

A. RAYMOND RANDOLPH, JR.,
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MARCH 1975.

ADDENDUM

ADDENDUM

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ADDENDUM

Public Law 91–173, December 30, 1969

83 STAT. 742

An Act To provide for the protection of the health and safety of persons working in the coal mining industry of the United States, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Coal Mine Health and Safety Act of 1969".

30 U.S.C. 801

FINDINGS AND PURPOSE

SEC. 2. Congress declares that—

(a) the first priority and concern of all in the coal mining industry must be the health and safety of its most precious resource—the miner;

(b) deaths and serious injuries from unsafe and unhealthful conditions and practices in the coal mines cause grief and suffering to the miners and to their families;

(c) there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines;

(d) the existence of unsafe and unhealthful conditions and practices in the Nation's coal mines is a serious impediment to the future growth of the coal mining industry and cannot be tolerated;

(e) the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such mines;

(f) the disruption of production and the loss of income to operators and miners as a result of coal mine accidents or occupationally caused diseases unduly impedes and burdens commerce; and

(g) it is the purpose of this Act (1) to establish interim mandatory health and safety standards and to direct the Secretary of Health, Education, and Welfare and the Secretary of the Interior to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal miners; (2) to require that each operator of a coal mine and every miner in such mine comply with such standards; (3) to cooperate with, and provide assistance to, the States in the development and enforcement of effective State coal mine health and safety programs; and (4) to improve and expand, in cooperation with the States and the coal mining industry, research and development and training programs aimed at preventing coal mine accidents and occupationally caused diseases in the industry.

30 U.S.C. 814

FINDINGS, NOTICES, AND ORDERS

SEC. 104. (a) If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the area throughout which such danger exists, and thereupon shall issue forthwith an order requiring the operator of the mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger no longer exists.

(b) Except as provided in subsection (i) of this section, if, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard but the violation has not created an imminent danger, he shall issue a notice to the operator or his agent fixing a reasonable time for the abatement of the violation. If, upon the expiration of the period of time as originally fixed or subsequently extended, an authorized representative of the Secretary finds that the violation has not been totally abated, and if he also finds that the period of time should not be further extended, he shall find the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to cause immediately all persons, except

570-342—75——3

those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that the violation has been abated.

* * * * * * *

(e) Notices and orders issued pursuant to this section shall contain a detailed description of the conditions or practices which cause and constitute an imminent danger or a violation of any mandatory health or safety standard and, where appropriate, a description of the area of the coal mine from which persons must be withdrawn and prohibited from entering.

(f) Each notice or order issued under this section shall be given promptly to the operator of the coal mine or his agent by an authorized representative of the Secretary issuing such notice or order, and all such notices and orders shall be in writing and shall be signed by such representative.

30 U.S.C. 819

PENALTIES

SEC. 109. (a)(1) The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, except the provisions of title 4, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. In

determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

(2) Any miner who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty assessed by the Secretary under paragraph (3) of this subsection, which penalty shall not be more than $250 for each occurrence of such violation.

(3) A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. Where appropriate, the Secretary shall consolidate such hearings with other proceedings under section 105 of this title. Any hearing under this section shall be of record and shall be subject to section 554 of title 5 of the United States Code.

(4) If the person against whom a civil penalty is assessed fails to pay the penalty within the time pre-

scribed in such order, the Secretary shall file a petition for enforcement of such order in any appropriate district court of the United States. The petition shall designate the person against whom the order is sought to be enforced as the respondent. A copy of the petition shall forthwith be sent by registered or certified mail to the respondent and to the representative of the miners in the affected mine or the operator, as the case may be, and thereupon the Secretary shall certify and file in such court the record upon which such order sought to be enforced was issued. The court shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order and decision of the Secretary or it may remand the proceedings to the Secretary for such further action as it may direct. The court shall consider and determine de novo all relevant issues, except issues of fact which were or could have been litigated in review proceedings before a court of appeals under section 106 of this Act, and upon the request of the respondent, such issues of fact which are in dispute shall be submitted to a jury. On the basis of the jury's findings, the court shall determine the amount of the penalty to be imposed. Subject to the direction and control of the Attorney General, as provided in section 507(b) of title 28 of the United States Code, attorneys appointed by the Secretary may appear for and represent him in any action to enforce an order assessing civil penalties under this paragraph.

37 Fed. Reg. 11861–62 (June 15, 1972)

30 C.F.R. Pt. 100 (1973)

RULES AND REGULATIONS

TITLE 30—MINERAL RESOURCES

CHAPTER I—BUREAU OF MINES,
DEPARTMENT OF THE INTERIOR

SUBCHAPTER O—COAL MINE HEALTH AND SAFETY

Part 100—Civil Penalties for Violations of the Federal Coal Mine Health and Safety Act of 1969

On June 8, 1972, appearing in 37 F.R. 11459, the Department of the Interior published amendments to the procedural rules applicable to hearings in civil penalty cases under the Federal Coal Mine Health and Safety Act of 1969. These amendments were primarily contained in Part 4, Title 43, Code of Federal Regulations with conforming amendments in Part 100, Title 30, Code of Federal Regulations. To provide the public with an opportunity to become familiar with the new procedure and insure an orderly changeover, the regulations were not to be effective until June 15, 1972. However, in making these conforming amendments, §§ 100.3 (d), (e), and (f) which should have been amended were inadvertently omitted. The purpose of this document is to properly conform § 100.3. In making these conforming amendments § 100.3(h) has also been modified. These conforming amendments to § 100.3 make

clear that a party may petition for hearing either upon receipt of the initial proposed order of assessment or upon receipt of an affirmed or amended proposed order of assessment. In addition, the time periods for filing an informal protest or a formal petition for hearing are made identical.

These procedural rules are used extensively throughout the coal mining industry and are often used by parties who are not attorneys. To allay any uncertainty these parties may have and to provide a complete and convenient reference to Part 100, the Department has decided to republish Part 100 as amended in its entirety. These amendments to Part 100, Title 30, Code of Federal Regulations, are effective June 15, 1972.

RICHARD R. HITE,
Deputy Assistant Secretary
of the Interior.

JUNE 13, 1972.

Part 100, Title 30, Code of Federal Regulations is revised and republished to read as follows:

Sec.

100.1 Purpose.
100.2 Assessment of civil penalties; general.
100.3 Procedures for assessment of civil penalties; protest procedures.
100.4 Hearing procedures.
100.5 Formal penalty assessment.

Appendix A—Guidelines for Assessment of Penalties.

AUTHORITY: The provisions of this Part 100 issued under secs. 109 and 508, Federal Coal Mine Health and Safety Act of 1969 (83 Stat. 742; Public Law 91–173).

§ 100.1 Purpose.

The assessment of civil penalties under section 109 of the Federal Coal Mine Health and Safety Act of 1969 shall be made for the purpose of maintaining the health and safety of the miner and of insuring the maximum compliance effort on the part of the coal mining industry.

§ 100.2 Assessment of civil penalties; general.

(a) Each proposed assessment shall be made after taking into consideration: (1) The operator's history of previous violations, (2) the appropriateness of the penalty to the size of the operator's business, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of violation.

(b) The amount of the civil penalty proposed shall be within guidelines established by the Secretary (see Appendix A to this part) and revised periodically in the light of experience gained under the Act, except that a particular violation may warrant proposing a civil penalty in an amount more than or less than the range set forth in the guidelines.

§ 100.3 Procedures for assessment of civil penalties; protest procedures.

(a) Each Notice of Violation and Order of Withdrawal issued on or after March 30, 1970, will be

reviewed by an Assessment Officer who is appointed by and responsible to the Director, Bureau of Mines, to determine the liability of the operator or miner for a civil penalty and the amount of penalty to be proposed.

(b)(1) Before any administrative proceeding to impose a civil penalty under section 109 of the Act is instituted, the Assessment Officer shall serve, by certified mail, a Proposed Order of Assessment upon the operator or miner charged.

(2) The Proposed Order of Assessment shall specify the Notice of Violation or Order of Withdrawal for which the liability of the operator or miner for a penalty has been determined and shall state the amount of the proposed civil penalty.

(c) In determining the amount of the proposed penalty the Assessment Officer will consider all relevant circumstances, including the operator's history of previous violations, the appropriateness of such penalty to the size of the operator's business, whether operator was neglect, the effect of the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of violation.

(d) The Proposed Order of Assessment shall also advise the operator or miner charged that he has 20 days from the date of receipt of the Proposed Order of Assessment to either protest the proposed assessment, either partly or in its entirety, or petition for hearing and formal adjudication.

(e) Where an operator or miner fails to either timely protest a proposed assessment or petition for hearing, he shall be deemed to have waived his right of protest and his right of formal adjudication with opportunity for hearing, and the Proposed Assessment Order shall become the final assessment order of the Secretary of the Interior.

(f) The protest to the Proposed Order of Assessment shall be in writing and shall state any facts, explanations, and arguments denying the charges of violation, or demonstrating any extenuating circumstances, error in the proposed Order of Assessment or other reason why the penalty should not be imposed and may request the revision or modification of the proposed penalty.

(g)(1) The Assessment Officer may extend in writing the time within which the operator or miner has to protest the Proposed Order Assessment.

(2) Upon receipt of a protest, the Assessment Office may reconsider the proposed assessment and may redetermine any proposed civil penalty.

(3) The Assessment Officer, upon reconsideration, may amend or reissue the Proposed Order of Assessment.

(h) The operator or miner charged shall have 20 days from the date of receipt of an amended or reissued proposed order to accept the proposed order, or to reject such order in whole or in part and petition for hearing and formal adjudication. Unless the operator or miner charged files a timely petition for hearing and formal adjudication an amended or

reissued proposed assessment order shall become the final assessment order of the Secretary.

§ 100.4 Hearing procedures.

An operator or miner who desires a hearing and formal adjudication shall file a petition for hearing with the Office of Hearings and Appeals in accordance with the procedures set forth in Title 43 Part 4 §§ 4.540 et seq. The address of the Office of Hearings and Appeals is 4015 Wilson Boulevard, Arlington, Va. 22203.

§ 100.5 Formal penalty assessment.

(a) In accordance with the procedural rules provided in Part 4, Title 43, Code of Federal Regulations, a hearing examiner or the Board of Mine Operations Appeals (both in the Office of Hearings and Appeals) shall thereafter issue an order based on findings of fact and conclusions of law.

(b) In assessing a civil penalty against an operator or miner, a hearing examiner or the Board of Miner Operations Appeals shall determine de novo the amount of the civil penalty for each violation in any amount not to exceed in the case of an operator, $10,000, and in the case of a miner, $250.

(c) In determining the existence of a violation or assessing a civil penalty thereon, neither the hearing examiner nor the Board is bound by the provisions or guidelines in this part relating to the making of proposed assessments.

Appendix A

Guidelines for Assessment of Penalties

Type of violations	*Penalty range (in dollars)*
1. Mine operators:	
A. Violations resulting in the issuance of imminent danger withdrawal orders	5,000–10,000
B. Violations resulting in the issuance of other withdrawal orders	1,000–5,000
C. Other violations	25–1,000
2. Miners: Smoking or the carrying of smoking materials, matches, or lighters	25–250

Note: Consideration of all relevant circumstances in the case of a particular violation may warrant the Assessment Officer's proposing a civil penalty in an amount more than or less than the range set forth above.

[FR Doc. 72-9053 Filed 6-14-72; 8:51 am]

(13)
(13.)

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY, PIKEVILLE

Civil Action No. 74–96

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, UNITED STATES DEPARTMENT OF THE INTERIOR, PETITIONER

vs

EARL WHITAKER, d/b/a E & K COAL COMPANY WOOTON, LESLIE COUNTY, KENTUCKY, RESPONDENT

Memorandum Opinion and Order

The Respondent, Earl Whitaker, doing business as E & K Coal Company, has filed a Motion to Dismiss the civil penalty assessment action filed by the Secretary of the Interior (hereinafter Secretary) under 30 U.S.C. 819(a)(4) for alleged violations of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 *et seq.* Respondent attacks the sufficiency of the Proposed Order of Assessment upon the ground that the Secretary failed to incorporate findings of fact into the Order sought to be enforced. Several other grounds are asserted in support of the Motion to Dismiss but are found to be without merit.

This Memorandum Opinion and Order is filed because the Sixth Circuit has not had opportunity to pass upon what is argued to be a material question of statutory construction upon which the Third Circuit and the District of Columbia Circuit have reached different conclusions. Upon hearing and consideration of the question I do not believe it is well made and will be overruled for the reasons which follow.

There is no material reason to state in detail the operative facts of this case since the ground for dismissal is dominantly a question of law. However, it should be noted that as a result of on-premises mine inspections by Inspector Charles A. Miller the Respondent was cited for violation of a number of safety regulations occurring during the summer of 1971. On November 8, 1971 the Secretary issued a Proposed Order of Assessment. Respondent remonstrated through counsel and on February 17, 1972 an Amended Proposed Order of Assessment was filed. The amendment involved a reduction in the aggregate amount of the proposed penalty from Eight Thousand One Hundred and Seventy-Five ($8,175.00) Dollars to Six Thousand One Hundred and Ten ($6,110.00) Dollars but did not alter any findings.

No timely request for a formal hearing on the issues was made.

Thereafter, the Secretary brought this action for the enforcement of the civil penalty assessment Order. As the attack goes directly to the sufficiency of the Order, it is set out in full:

"UNITED STATES DEPARTMENT OF THE INTERIOR,
BUREAU OF MINES,
Washington, D.C., November 29, 1972.

Re *E. and K. Coal Company,* Operator.

Case No. 1977–1.

I hereby find that the violations which were cited in the amended proposed order of assessment dated February 17, 1972 did, in fact, occur and accordingly adopt the assessment set forth therein for those violations as final.

EVERETT TURNER,
Assessment Officer.

Certificate of Service

I hereby certify that a copy of the foregoing was sent to the operator, certified mail, return receipt requested on November 29, 1972.

EVERETT TURNER,
Assessment Officer.

This decision was filed pursuant to the statutory directive contained in 30 U.S.C. 892(a)(3) which states:

> A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this chapter has been given the opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. . . . Any hearing under this section shall be of record and shall be subject to section 554 of Title 5.

There is no question about the Respondent being offered a hearing. The administrative record is conclusive on this point. At issue, then, is the duty of the Secretary in reporting his decision making where no hearing is involved. This is the question over which the District of Columbia Court of Appeals and the Third Circuit Court of Appeals have arguably differed. In *Morton* v. *Delta Mining, Inc.,* 495 F. 2d 38 (3d Cir. 1974), the Court determined:

> . . . that each final assessment order be accompanied by the Secretary's express findings, concerning both the fact of violation and the appropriate penalty amount. 495 F. 2d at 43.

In *National Independent Coal Operators' Ass'n* v. *Morton,* 494 F. 2d 987 (D.C. Cir. 1974), the Court concluded:

> . . . the Act does not require the Secretary to prepare a formal decision unless the mine operator requests a formal adjudication. Upon receipt of a proposed assessment order, if a mine operator wants to contest either the fact of the violation or the amount of the proposed penalty, he need only request a hearing and briefly describe the issues in dispute. Following such a request the Secretary must provide formal adjudication in compliance with 5 U.S.C. § 554, including formal decision. The Act does not require a formal decision where no hearing is requested and issues are in dispute. 494 F. 2d at 994.

I am not persuaded that there is any necessary conflict between the circuits. The Third Circuit with manifest lucidity construes the statute as requiring "express findings" and the District of Columbia Circuit perceives no requirement for formal decision "unless the mine operator requests a formal adjudication". It is my opinion that both views are correct and do not conflict. To find a conflict it would be necessary to equate "express findings" with the concept of a formal opinion. That such terms are not synonymous is patently obvious. The view in the Coal Operators' Association opinion that "[t]he Act does not require a formal decision where no hearing is requested and no issues are in dispute" comports logically to the clear language of the statute.

In the case at hand the Secretary had for consideration the specifications of the unappealed charges and the amended penalty assessment amounts, on the one

hand, and the statement of objections augmented by affidavits on the other hand. The evidentiary question was whether the violations occurred. The Secretary's delegate expressly found that the violations charged did, in fact, occur. He further found by adoption the assessments to be appropriate in the individual cases. In my view the instant case shows the propriety of each of the cited circuit views.

The function of the decision of the Secretary is to serve as the basis for enforcement or as the scope of the issues for a trial *de novo*. 30 U.S.C. 819(a)(4). I have no difficulty in ascertaining from the Order and the administrative record the precise dates of violation, compliance where it was effected, the supporting statutory or regulatory sections involved or the amounts of the asserted penalty. Nothing material is left to speculation or conjecture and, although individual preferences for style and format may arise, it is not the function of this Court to arbitrate or prescribe for the Secretary matters of presenting his findings or making his record in a non-hearing case.

I find that the Order of November 29, 1972 substantially complies with the requirements of 30 U.S.C. 819(a)(3). I find that the provisions of the Administrative Procedures Act, 5 U.S.C. 554, are not applicable in the instant case.

Accordingly, IT IS ORDERED that the Respondent's Motion to Dismiss be, and it hereby is, OVERRULED.

This the 14th day of January, 1975.

H. DAVID HERMANSDORFER, *Judge*.

A True Copy Attest:

MARY F. BLALOCK

EXCERPTS FROM ADMINISTRATIVE RECORD IN DELTA MINING, INC.

U.S. DEPARTMENT OF THE INTERIOR,
BUREAU OF MINES,
Washington, D.C., April 11, 1972.

ID: 36–03248–0.

Re Mine: Delta No. 1, Case No.: 2312.

Certified Mail, Return Receipt Requested.
Delta Mining, Incorporated,
Box 99,
State Line, Pennsylvania 17213.
Attention: Dwight L. Grove

GENTLEMEN: Enclosed is a Proposed Order of Assessment concerning the above-captioned matter setting out the number, date, section violated and the proposed amount for each citation. You may protest in writing the proposed assessment for each violation or request formal adjudication within fifteen working days of your receipt of this correspondence to:

Assessment Officer
U. S. Bureau of Mines
Room 210
1725 K Street, N.W.
Washington, D.C. 20006

570-342—75——6

Failure to file a protest to the proposed assessment or request formal adjudication within the aforementioned time will be considered a waiver of your right to protest, including your right to formal adjudication and an opportunity for a hearing. The matter will then become the final Order of the Secretary. In replying, please refer to the case number.

Payment of the assessment should be made in the form of a check or money order made payable to the U.S. Bureau of Mines and mailed to:

Chief, Division of Finance
U. S. Bureau of Mines
Building 20
Denver Federal Center
Denver, Colorado 80225

Sincerely yours,

EVERETT TURNER,
Assessment Officer.

U.S. DEPARTMENT OF THE INTERIOR,
BUREAU OF MINES,
Washington, D.C.

ID: 36-03248-0.
Re: Mine:: Delta No. 1. Case No: 2312.
In the matter of:

DELTA MINING, INCORPORATED

Stonycreek Twp,
Somerset County, Pennsylvania

PROPOSED ORDER OF ASSESSMENT

The above-captioned matter having come on for consideration and consideration having been given to

all available information, including the operator's history of previous violation, the appropriateness of the proposed assessment to the size of the business of the operator charged, whether the operator was negligent, the effect of the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the operator charged:

It is hereby ordered that Delta Mining, Incorporated be and the same is hereby assessed a civil penalty in the amount of three hundred seventy-five dollars ($375.00) for the following violation:

Violation No.	Date issued	Violation	Assessment
1 JWH	Jan. 24, 1972	75.313	$55
2 JWH	do	75.504	80
3 JWH	do	75.1600	30
4 JWH	do	75.1714	60
1 JWH	Jan. 26, 1972	77.400	90
2 JWH	do	77.204	60

Total Assessed Amount $375.00.

EVERETT TURNER,
Assessment Officer.

Dated at Washington, D.C. and entered as the Proposed Order of Assessment April 11, 1972.

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6-152
(August 1971)

Symbol 1

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES

Coal Mine Health and Safety Subdistrict Office
111 Franklin Street
Johnstown, Pennsylvania 15901

TO THE OPERATOR, OR HIS AGENT, OF THE
DELTA NO. 1 MINE
Company DELTA MINING INC.
Location Stonycreek Township, Somerset County, Pa.
I.D. No. 36-03248-0

☐ ORDER ☒ NOTICE No. 1 JWH

Time: 1:00 ☐ A.M. ☒ P.M. Date: January 24 1972 FRED DENNING-mine Foreman
(Person Served)

Pursuant to the Federal Coal Mine Health and Safety Act of 1969 (83 Stat. 742; 30 USC 801; PL 91-173) the undersigned duly authorized representative of the Secretary of the Interior, upon making an inspection of the above named mine on this date finds that the following described condition or practice exists in the mine:

Condition or Practice

A methane monitor, approved as reliable by the Secretary was not installed on the continuous miner in mains section

[Cont'd Sheet No.]

The undersigned finds that:
☐ Men had been withdrawn prior to issuance of this order
☐ An IMMINENT DANGER EXISTS in that the condition or practice described could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.
☒ There has been a violation of § 75.313 of Part 75, Title 30, Code of Federal Regulations, a mandatory health or safety standard, but the violation has not created an imminent danger.
☐ The undersigned further finds:
☐ the violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and is caused by an unwarrantable failure to comply with such standard.
☐ The violation was found ☐ during the same inspection in which
☐ during a subsequent inspection made within 90 days after
Notice No. ..... was issued on ....., 19.....
and is also caused by an unwarrantable failure to comply with such standard.
☐ the violation is similar to the violation of the mandatory health or safety standard which resulted in the issuance of Withdrawal Order No. ..... on ....., 19....., and no inspection of the mine has been made since such date which disclosed no similar violation.

ACTION REQUIRED

☒ NOTICE The violation of the mandatory health or safety standard described above shall be totally abated by 5 o'clock A.M. on FEBRUARY 24, 19 72.

☐ ORDER You are hereby ORDERED to cause immediately all persons, except those referred to in subsection (d) of section 104 of the Act, to be withdrawn from, and to be prohibited from entering, the area of the mine described below until an authorized representative of the Secretary of the Interior determines that the imminent danger no longer exists or the violation of the mandatory health or safety standard has been abated.

Area of Mine

Cont'd Sheet No. .....

Orders 104 (a) ☐ 104 (c) (1) ☐ 104 (c) (2) ☐
Notices 104 (b) ☒ 104 (c) (1) ☐

Signed Jerrold W. Hopkins
Authorized Representative

U.S. GOVERNMENT PRINTING OFFICE: 1971 — 466-065 Form 1

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6-152
(August 1971)

Symbol 1

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES

Coal Mine Health and Safety Subdistrict Office
111 Franklin Street
Johnstown, Pennsylvania 15901

TO THE OPERATOR, OR HIS AGENT, OF THE
DELTA NO. 1 MINE
Company DELTA MINING INC.
Location Stonycreek Township, Somerset County, Pa.
I.D. No. 36-03248-0

☐ ORDER ☒ NOTICE No. 2 JWH

Time: 1:00 ☐ A.M. ☒ P.M. Date: January 24 1972 Fred Denning-mine Foreman
(Person Served)

Pursuant to the Federal Coal Mine Health and Safety Act of 1969 (83 Stat. 742; 30 USC 801; PL 91-173) the undersigned duly authorized representative of the Secretary of the Interior, upon making an inspection of the above named mine on this date finds that the following described condition or practice exists in the mine:

Condition or Practice

The face cutout used to protect the electrical wires leading from the junction box to the lift motor was not installed on the continuous miner.

[Cont'd Sheet No.]

The undersigned finds that:
☐ Men had been withdrawn prior to issuance of this order
☐ An IMMINENT DANGER EXISTS in that the condition or practice described could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.
☒ There has been a violation of § 75.313 of Part 75, Title 30, Code of Federal Regulations, a mandatory health or safety standard, but the violation has not created an imminent danger.
☐ The undersigned further finds:
☐ the violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and is caused by an unwarrantable failure to comply with such standard.
☐ The violation was found ☐ during the same inspection in which
☐ during a subsequent inspection made within 90 days after
Notice No. ..... was issued on ....., 19.....
and is also caused by an unwarrantable failure to comply with such standard.
☒ the violation is similar to the violation of the mandatory health or safety standard which resulted in the issuance of Withdrawal Order No. ..... on ....., 19....., and no inspection of the mine has been made since such date which disclosed no similar violation.

ACTION REQUIRED

☒ NOTICE The violation of the mandatory health or safety standard described above shall be totally abated by 5 o'clock ..... on ....., 19.....

☐ ORDER You are hereby ORDERED to cause immediately all persons, except those referred to in subsection (d) of section 104 of the Act, to be withdrawn from, and to be prohibited from entering, the area of the mine described below until an authorized representative of the Secretary of the Interior determines that the imminent danger no longer exists or the violation of the mandatory health or safety standard has been abated.

Area of Mine

Cont'd Sheet No. .....

Orders 104 (a) ☐ 104 (c) (1) ☐ 104 (c) (2) ☐
Notices 104 (b) ☒ 104 (c) (1) ☐

Signed Jerrold W. Hopkins
Authorized Representative

U.S. GOVERNMENT PRINTING OFFICE: 1971 — 466-065 Form 1

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(August 1971)

Symbol 1

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES

Coal Mine Health and Safety Subdistrict Office
111 Franklin Street
Johnstown, Pennsylvania 15901

TO THE OPERATOR, OR HIS AGENT, OF THE
Dana No. 1 MINE
Company Dana Mining Co.
Location [illegible]
I.D. No. 36-02480

☐ ORDER ☒ NOTICE No. 3 Jan 72

Time 1:00 ☐ A.M. ☒ P.M. Date January 24 1972 Fred Browning Mine Foreman
(Person Served)

Pursuant to the Federal Coal Mine Health and Safety Act of 1969 (83 Stat. 742; 30 USC 801; PL 91-173) the undersigned 'duly authorized representative of the Secretary of the Interior, upon making an inspection of the above named mine on this date finds that the following described condition or practice exists in the mine:

Condition or Practice

Telephone service was not provided from the surface to the underground working section

[Cont'd Sheet No.]

The undersigned finds that:
☐ Men had been withdrawn prior to issuance of this order
☐ An IMMINENT DANGER EXISTS in that the condition or practice described could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

☒ There has been a violation of § 75.1600-2 of Part 75, Title 30, Code of Federal Regulations, a mandatory health or safety standard, but the violation has not created an imminent danger.
☐ The undersigned further finds:
☐ the violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and is caused by an unwarrantable failure to comply with such standard.
☐ The violation was found ☐ during the same inspection in which
☐ during a subsequent inspection made within 90 days after

Notice No. ..... was issued on ....., 19.....
☐ the violation is similar to the violation of the mandatory health or safety standard which resulted in the issuance of Withdrawal Order No. ..... on ....., 19....., and no inspection of the mine has been made since such date which disclosed no similar violation.

ACTION REQUIRED

☒ NOTICE The violation of the mandatory health or safety standard described above shall be totally abated by ..... o'clock ..... on ....., 19.....

☐ ORDER You are hereby ORDERED to cause immediately all persons, except those referred to in subsection (d) of section 104 of the Act, to be withdrawn from, and to be prohibited from entering, the area of the mine described below until an authorized representative of the Secretary of the Interior determines that the imminent danger no longer exists or the violation of the mandatory health or safety standard has been abated.

Area of Mine

Cont'd Sheet No. .....

Orders 104 (a) ☐ 104 (c) (1) ☐ 104 (e) (2) ☐
Notices 104 (b) ☐ 104 (c) (1) ☐

Signed [signature]
Authorized Representative

U.S. GOVERNMENT PRINTING OFFICE: 1971 — 440-014 Form 1

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(August 1971)

Symbol 1

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES

Coal Mine Health and Safety Subdistrict Office
111 Franklin Street
Johnstown, Pennsylvania 15901

TO THE OPERATOR, OR HIS AGENT, OF THE
Dana No. 1 MINE
Company Dana Mining Co.
Location [illegible]
I.D. No. 36-02480

☐ ORDER ☒ NOTICE No. 4 Jan 72

Time 1:00 ☐ A.M. ☒ P.M. Date January 24 1972 Fred Browning Mine Foreman
(Person Served)

Pursuant to the Federal Coal Mine Health and Safety Act of 1969 (83 Stat. 742; 30 USC 801; PL 91-173) the undersigned 'duly authorized representative of the Secretary of the Interior, upon making an inspection of the above named mine on this date finds that the following described condition or practice exists in the mine:

Condition or Practice

A self-rescue device approved by the Secretary was not made available for each underground workman.

[Cont'd Sheet No.]

The undersigned finds that:
☐ Men had been withdrawn prior to issuance of this order
☐ An IMMINENT DANGER EXISTS in that the condition or practice described could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

☒ There has been a violation of § 75.1714 of Part 75, Title 30, Code of Federal Regulations, a mandatory health or safety standard, but the violation has not created an imminent danger.
☐ The undersigned further finds:
☐ the violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and is caused by an unwarrantable failure to comply with such standard.
☐ The violation was found ☐ during the same inspection in which
☐ during a subsequent inspection made within 90 days after

Notice No. ..... was issued on ....., 19.....
☐ the violation is similar to the violation of the mandatory health or safety standard which resulted in the issuance of Withdrawal Order No. ..... on ....., 19....., and no inspection of the mine has been made since such date which disclosed no similar violation.

ACTION REQUIRED

☒ NOTICE The violation of the mandatory health or safety standard described above shall be totally abated by ..... o'clock ..... on ....., 19.....

☐ ORDER You are hereby ORDERED to cause immediately all persons, except those referred to in subsection (d) of section 104 of the Act, to be withdrawn from, and to be prohibited from entering, the area of the mine described below until an authorized representative of the Secretary of the Interior determines that the imminent danger no longer exists or the violation of the mandatory health or safety standard has been abated.

Area of Mine

Cont'd Sheet No. .....

Orders 104 (a) ☐ 104 (c) (1) ☐ 104 (e) (2) ☐
Notices 104 (b) ☒ 104 (c) (1) ☐

Signed [signature]
Authorized Representative

U.S. GOVERNMENT PRINTING OFFICE: 1971 — 440-014 Form 1

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Form 1-1002
(August 1971)

Symbol 1

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES

Coal Mine Health and Safety Subdistrict Office
111 Franklin Street
Johnstown, Pennsylvania 15901

TO THE OPERATOR, OR HIS AGENT, OF THE
DELTA NO. 1 MINE
Company DELTA Mining INC.
Location STONYCREEK Township, SOMERSET County Pa.
I.D. No. 36-03248-0

☐ ORDER ☒ NOTICE No. 1 J.W.H.

Time: 1:00 ☐ A.M. ☒ P.M. Date January 26 1972 Fred Dressing Mine Foreman.
(Person Served)

Pursuant to the Federal Coal Mine Health and Safety Act of 1969 (83 Stat. 742; 30 USC 801; PL 91-173) the undersigned duly authorized representative of the Secretary of the Interior, upon making an inspection of the above named mine on this date finds that the following described condition or practice exists in the mine:

Condition or Practice

the belt chain drive at the top of the storage bin was not guarded to prevent persons from coming in Contact with the chain drive.

[Cont'd Sheet no.]

The undersigned finds that:
☐ Men had been withdrawn prior to issuance of this order
☐ An IMMINENT DANGER EXISTS in that the condition or practice described could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

☒ There has been a violation of § 77.400 of Part 77, Title 30, Code of Federal Regulations, a mandatory health or safety standard, but the violation has not created an imminent danger.
☐ The undersigned further finds:
☐ the violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and is caused by an unwarrantable failure to comply with such standard.
☐ The violation was found ☐ during the same inspection in which
☐ during a subsequent inspection made within 90 days after
Notice No. ..... was issued on ....., 19.....
and is also caused by an unwarrantable failure to comply with such standard.
☐ the violation is similar to the violation of the mandatory health or safety standard which resulted in the issuance of Withdrawal Order No. ..... on ....., 19....., and no inspection of the mine has been made since such date which disclosed no similar violation.

ACTION REQUIRED

☒ NOTICE The violation of the mandatory health or safety standard described above shall be totally abated by 8 o'clock A.M. on February 24 19 72

☐ ORDER You are hereby ORDERED to cause immediately all persons, except those referred to in subsection (d) of section 104 of the Act, to be withdrawn from, and to be prohibited from entering, the area of the mine described below until an authorized representative of the Secretary of the Interior determines that the imminent danger no longer exists or the violation of the mandatory health or safety standard has been abated.

Area of Mine

Cont'd Sheet No. .....

Orders 104 (a) ☐ 104 (c) (1) ☐ 104 (c) (2) ☐
Notices 104 (b) ☒ 104 (f) ☐

Signed Jessie W. Hopkins
Authorized Representative

U.S. GOVERNMENT PRINTING OFFICE: 1971 — 446-008 Form 1

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31a

Form 1-1002
(August 1971)

Symbol 1

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES

Coal Mine Health and Safety Subdistrict Office
111 Franklin Street
Johnstown, Pennsylvania 15901

TO THE OPERATOR, OR HIS AGENT, OF THE
DELTA NO. 1 MINE
Company DELTA MINING INC.
Location STONYCREEK Township, SOMERSET POINT, Pa.
I.D. No. 36-03248-0

☐ ORDER ☒ NOTICE No. 2 J.W.H.

Time: 1:00 ☐ A.M. ☒ P.M. Date JANUARY 26 1972 Fred Dressing Mine Foreman
(Person Served)

Pursuant to the Federal Coal Mine Health and Safety Act of 1969 (83 Stat. 742; 30 USC 801; PL 91-173) the undersigned duly authorized representative of the Secretary of the Interior, upon making an inspection of the above named mine on this date finds that the following described condition or practice exists in the mine:

Condition or Practice

the opening around the belt drive and motor at the top of the storage bin was not covered to prevent persons from falling in the bin.

[Cont'd Sheet No.]

The undersigned finds that:
☐ Men had been withdrawn prior to issuance of this order
☐ An IMMINENT DANGER EXISTS in that the condition or practice described could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

☒ There has been a violation of § 77.2 (c) (4) of Part 77, Title 30, Code of Federal Regulations, a mandatory health or safety standard, but the violation has not created an imminent danger.
☐ The undersigned further finds:
☐ the violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and is caused by an unwarrantable failure to comply with such standard.
☐ The violation was found ☐ during the same inspection in which
☐ during a subsequent inspection made within 90 days after
Notice No. ..... was issued on ....., 19.....
☐ the violation is similar to the violation of the mandatory health or safety standard which resulted in the issuance of Withdrawal Order No. ..... on ....., 19....., and no inspection of the mine has been made since such date which disclosed no similar violation.

ACTION REQUIRED

☒ NOTICE The violation of the mandatory health or safety standard described above shall be totally abated by 8 o'clock A.M. on February 24 19 72

☐ ORDER You are hereby ORDERED to cause immediately all persons, except those referred to in subsection (d) of section 104 of the Act, to be withdrawn from, and to be prohibited from entering, the area of the mine described below until an authorized representative of the Secretary of the Interior determines that the imminent danger no longer exists or the violation of the mandatory health or safety standard has been abated.

Area of Mine

Cont'd Sheet No. .....

Orders 104 (a) ☐ 104 (c) (1) ☐ 104 (c) (2) ☐
Notices 104 (b) ☒ 104 (f) ☐

Signed Jessie W. Hopkins
Authorized Representative

U.S. GOVERNMENT PRINTING OFFICE: 1971 — 446-008 Form 1

FREDERICK R. BLACKWELL,
Washington, D.C., April 27, 1972.

Re: Delta Mining, Inc., Box 99, State Line, Pa.
Delta No. 1, Case No. 2312, Proposed
Assessment: $375. Issued, 4-11-72;
Received April 13, 1972.

MR. EVERETT TURNER,
Assessment Officer
U.S. Department of the Interior,
Bureau of Mines,
Washington, D.C. 20240

DEAR MR. TURNER: On behalf of Delta Mining, Inc., I hereby protest the above Proposed Assessment on the grounds that—

(1) The subject mine is a new mine having been opened in November of 1971, and, in consequence, the mine management personnel are confronted with the usual problems of the orientation of a new work force;

(2) The alleged violations covered by the assessment relate to matters having only minor significance in terms of safety; and

(3) The company is making a strong, good faith effort to achieve compliance with all health and safety standards; and

(4) The subject mine is a small mine producing approximately 8,000 tons of coal monthly; and

(5) The proposed penalties will have an adverse effect on the operator's ability to continue in business.

Sincerely,

FREDERICK R. BLACKWELL,
Attorney, Delta Mining, Inc.

U.S. DEPARTMENT OF THE INTERIOR,
BUREAU OF MINES,
Washington, D.C., May 17, 1972.

ID: 36-03248-0

Re Mine: Delta No. 1, Case No: 2312. Proposed Order Affirmed (X): Amended Order Affirmed ( ).
Certified Mail, Return Receipt Requested.
DELTA MINING, INCORPORATED,
Box 99,
State Line, Pennsylvania 17213
Attention: Dwight L. Grove.

GENTLEMEN: Receipt is acknowledged of your letter of protest dated April 27, 1972 relevant to the Order of Assessment dated April 11, 1972. After review of all available information, including your letter of protest, the matter was given careful consideration, and the Order of Assessment is hereby affirmed. Please be advised that the abatement of a violation of the Federal Coal Mine Health and Safety Act of 1969 is not a defense relative to a proposed assessment. You may, within fifteen working days of receipt of this letter, request in writing a formal adjudication with an opportunity for a hearing to:

Assessment Officer
U.S. Bureau of Mines
Room 210
1725 K Street, N.W.
Washington, D.C. 20006

If we do not receive a request for adjudication within the aforementioned time, the matter will then become the Final Order of the Secretary. In replying, please refer to the case number.

Payment of the assessment should be made in the form of a check or money order made payable to the United States Bureau of Mines and mailed to:

Chief, Division of Finance
U. S. Bureau of Mines
Building 20
Denver Federal Center
Denver, Colorado 80225

Sincerely yours,

EVERETT TURNER,
Assessment Officer.
FREDERICK B. BLACKWELL, *Attorney at Law.*

U. S. DEPARTMENT OF THE INTERIOR,
BUREAU OF MINES,
Washington, D.C., June 26, 1972.

Re Mine: Delta No. 1. Case No.: 2312. Proposed Order (x): Amended Order ( ): Affirmed Order ( ). Certified mail, Return Receipt Requested.
DELTA MINING, INCORPORATED
Box 99
State Line, Pennsylvania 17213
Attention: Dwight L. Grove.

Gentlemen: No request for formal adjudication having been filed within fifteen (15) working days of your receipt of the above-captioned matter dated

April 11, 1972, you are hereby notified that the said Order has now been entered as the final Order of the Secretary. This Order is issued pursuant to Section 109(a) of the Federal Coal Mine Health and Safety Act of 1969, (30 U.S.C. 819) and the regulations promulgated thereunder as set forth in Title 30, Code of Federal Regulations, Part 100.

Unless payment of the assessment in the amount of $375.00 is made within ten (10) working days of the receipt of this letter, this matter will be referred to the Office of the Solicitor for the enforcement of said payment in an appropriate district court of the United States. In this connection, we call your attention to Section 109(a)(4) of the Federal Coal Mine Health and Safety Act of 1969, (30 U.S.C. 819), which sets forth in detail the method of enforcement of the Final Order of the Secretary.

Payment of the assessment should be made in the form of a check or money order made payable to the U.S. Bureau of Mines and mailed to:

Chief, Division of Finance
U.S. Bureau of Mines
Building 20
Denver Federal Center
Denver, Colorado 80225

If full payment for the case has been made, please disregard this letter.

Sincerely yours,

EVERETT TURNER,
Assessment Officer.
FREDERICK B. BLACKWELL, *Attorney at Law.*

U.S. DEPARTMENT OF THE INTERIOR,
BUREAU OF MINES,
Washington, D.C., August 17, 1972.

Re Delta Mining, Incorporated, Operator.
Case No. 2312

I hereby find that the violations cited in the proposed order of assessment dated April 11, 1972 did, in fact, occur and accordingly adopt the assessment set forth therein as final.

EVERETT TURNER,
Assessment Officer.

U.S. GOVERNMENT PRINTING OFFICE: 1970